separate charges. We, therefore, on the whole, think that the case should be re-tried upon the three charges under section 477A as originally committed to the Sessions.

The conviction and sentence passed upon the appellant are set aside, and he will remain on the same bail pending his re-trial before the Court of Session as ordered above.

E. H. M. *Re-trial directed.*

APPELLATE CIVIL.

Before Coxe and D. Chatterjee JJ.

DEBI PROSAD SAHI

v.

DHARAMJIT NARAYAN SINGH*.

Mortgage—Hindu law—Mortgagee holding an usufructuary and a simple mortgage over the same property—Suit by the mortgagee as kurta of Joint Hindu family on later mortgage alone—Maintainability—Non-joinder of necessary party—Transfer of Property Act (IV of 1882) ss. 85, 99—Civil Procedure Code (Act V. of 1908) O. XXXIV, rr. 1, 14.

Where the *Kurta* of a joint Hindu family, who was the holder of an usufructuary and a simple mortgage, brought a suit on the latter without joining as party one of the members of the family, who had a joint interest with him in the usufructuary mortgage :—

Held, that under the terms of s. 85 of the Transfer of Property Act and O. XXXIV, r. 1 of the Civil Procedure Code, the plaintiff was bound to make him a party.

Hori Lal v. *Munman Kunwar* (1) and *Madan Lal* v. *Kishan Singh* (2) not followed.

Lala Surja Prosad v. *Golab Chand* (3) followed.

* Appeal from Original decree, No. 149 of 1909, against the decree of S. K. Nag, Subordinate Judge of Saran, dated Nov. 30, 1908.

(1) (1912) I. L. R. 34 All. 549.
(2) (1912) I. L. R. 34 All. 572.
(3) (1900) I. L. R. 27 Calc. 724, & (1901) I. L. R. 28 Calc. 517.

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APPEAL by Debi Prosad Sahi and others, the defendants.

On the 25th August, 1885, Debi Prosad Sahi and his co-sharers executed an usufructuary mortgage of the 16 annas share of *mauza* Kathtal in favour of one Ramrup, who, subsequently, assigned it to Dharamjit and his brother, Sarabjit. On the 2nd May 1889, Debi Prosad Sahi took a lease of the half of the said *mauza* from the two brothers. The rent having fallen into arrears, the lessee, on the 20th April, 1892, while the usufructuary mortgage was still in existence, executed a simple mortgage of the half share of the said *mauza* in favour of Dharamjit, agreeing to repay the debt secured by this mortgage bond in the beginning of September 1892. Sometime previous to the execution of this simple mortgage bond, Sarabjit died leaving him surviving his son, Masudan, who continued to live joint with Dharamjit, the latter being the *kurta* of the family. On the 15th August, 1904, Dharamjit instituted this suit against Debi Prosad Sahi and the several subsequent purchasers, for enforcing payment of the principal sum and interest secured by the simple mortgage bond and obtained an *ex parte* decree in that year. In 1908, this decree was made absolute, but was, subsequently, set aside under section 108 of the Code of Civil Procedure, 1882, and was again ultimately decreed in November, 1908. The defendants, thereupon, appealed to the High Court.

Babu Umakali Mukerji (with him *Babu Satish Chandra Ghose*), for the appellants. The two questions involved in this appeal were—(i) whether the *kurta* could bring this suit in his own name alone, and (ii) whether a person having an usufructuary mortgage and also a simple mortgage could sue on the simple mortgage without first redeeming the usufructuary mortgage. With regard to the *first* point, the

contention was, that the plaintiff executed a simple mortgage of the property itself and not merely of his interest in the same. Section 85 of the Transfer of Property Act required all persons who had an interest in the mortgage debt to be joined in an action to enforce the security, provided the plaintiff had notice of the interest. In the present suit, Masudan admittedly had an interest in the mortgaged property. He was the mortgagee of the usufructuary interest in the property along with the plaintiff, whose own evidence was that Masudan's and his interests were joint. Therefore, under the provisions of section 85 of the Transfer of Property Act, Masudan must be joined as party and the plaintiff was incompetent to sue alone. Furthermore, in a real suit all parties interested must be brought on the record. They must all be before the Court and this was true in the case of defendants as well as of plaintiffs. In personal suits, however, the case was different, inasmuch as the *benamidar* might proceed in his own name: Ghose's Law of Mortgage, 4th Edn. Vol. I, p. 578, and Shephard and Brown's Transfer of Property Act, 7th Edn. p. 501, and the cases of *Munshi Basiruddin Ahmed* v. *Mahomed Jalish Patwari* (1) and *Lala Suraj Prosad* v. *Golab Chand* (2) were relied on. This suit was, therefore, incompetent and must fail. If Masudan were now made a party, the suit would be hopelessly barred. With regard to the *second* point, a person having two mortgages on one and the same property ought not to be allowed to sue on the second mortgage whilst keeping the first mortgage alive. The cases of *Sri Gopal* v. *Pirthi Singh* (3), *Dorasami* v. *Venkataseshayyar* (4), *Nattu Krishnama Chariar* v. *Annangara Chariar* (5),

(1) (1008) 12 C. W. N. 409.
(2) (1901) I. L. R. 28 Calc. 517.
(3) (1902) L. R. 29 I. A. 116.
(4) (1901) I. L. R. 25 Mad. 108.
(5) (1907) I. L. R. 30 Mad. 353.

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Keshavram Dulavram v. *Ramchhod Fakira* (1) and *Bhagwan Das* v. *Bhawani* (2) were relied on, the circumstances in the last of these cases being exactly similar to those in the present suit. There was no law that prevented separate suits being brought on separate mortgages. The reasoning in the judgment in *Nattu Krishnama Chariar* v. *Annangara Chariar* (3) was adopted as part of the argument.

Dr. Dwarka Nath Mitter, for the respondent. Section 85 of the Transfer of Property Act should be applied to only those cases where the equity of redemption would be affected. It concerned the joining of defendants and was solely confined to them. In a mortgage suit it did not lie in the mortgagor to contend that the mortgagee was only partially interested in the property. The equity of redemption always remained in the mortgagor and it was this property which was the estate in the land. Admitting for the sake of argument that section 85 was not confined merely to the cases where defendants were to be joined, in the present case the plaintiff and those interested in the mortgage security were sufficiently represented by the *kurta*, who, as such, represented every member of the family. This section was not intended to do away with the principle of representation in the case of the mortgagee. The mortgagor's rights had in no way been affected by the non-joinder of Masudan. It would always be a good defence for him in a subsequent suit to say that he had satisfied the claims of the mortgagee and that the mortgagee was not entitled to bring any further suit on the prior mortgage. As regards the second contention of the appellants, there was nothing in the Transfer of Property Act

(1) (1905) I. L. R. 30 Bom. 156. (2) (1903) I. L. R. 26 All. 14.
(3) (1907) I. L. R. 30. Mad. 353.

which barred the institution of a suit by a subsequent mortgagee without his first suing on the prior mortgage, in which he had previously acquired an interest. If the principle of the appellants were sound that such a suit was not maintainable, then it would lead to this anomaly that a suit on a subsequent mortgage would necessitate a suit on the prior mortgage where the due date had not arrived. In contending that the present suit was maintainable, the cases of *Shankar Sarup* v. *Lala Phul Chand*(1), *Ram Shankar Lal* v. *Ganesh Prasad* (2), *Radhakrishna Iyer* v. *Muthusawmy Sholagan* (3), *Gobind Pershad* v. *Harihar Charan* (4), *Sundar Singh* v. *Bholu* (5), and *Kali Charan* v. *Ahmad Shah Khan* (6) were relied on. It was further contended that the defect, if any, of not making Masudan a party in this suit could be remedied by now joining him as party: see *Tikam Singh* v. *Thakur Kishore Ramanji Maharaj* (7), *Kundan Lal* v. *Faqir Chand* (8) and *Sorabji Cursetji Sett* v. *Rattonji Dossabhoy Karani* (9), and in view of the decisions in these cases Masudan should now be added as a party to this suit.

Babu Umakali Mookerji, in reply.

Cur. adv. vult.

COXE, J. The first defendant in this case, one Debi Prosad, and his co-sharers executed an usufructuary mortgage of village Kathtal in favour of one Ramrup in 1885. He assigned it to the plaintiff Dharamjit and his brother Sarabjit. Thereafter, the two brothers

(1) (1901) 5 C.W.N. 649.
(2) (1907) I.L.R. 29 All., 385.
(3) (1908) I.L.R. 31 Mad. 530.
(4) (1910) I.L.R. 38 Calc. 60.
(5) (1898) I.L.R. 20 All. 322.
(6) (1894) I.L.R. 17 All. 48.
(7) (1897) I.L.R. 20 All. 188.
(8) (1904) I.L.R. 27 All. 75.
(9) (1898) I.L.R. 22 Bom. 701.

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COXE J,

leased half this property back to Debi Prosad. The rent fell into arrears and Debi Prosad then executed a simple mortgage of "8 annas share out of the entire "16 annas of Mouza Kathtal, etc., constituting my "(Debi Prosad's) proprietary right which has from "before been held in *zurpesgi* lease by the said credi-"tor," in favour of Dharamjit. At that time Sarabjit was dead, leaving a son Masudan. Dharamjit and Masudan are joint and the former is the *kurta*.

The due date of payment was the beginning of September, 1892, and this suit was instituted by Dharamjit alone on the 15th August, 1904. It was decreed *ex parte* in that year and the decree was made absolute in 1908. The decree was set aside under Order IX, rule 13, and was ultimately decreed in November, 1908. The defendants, who are Debi Prosad and several subsequent purchasers, appealed.

Two points are taken on their behalf. The first is that the suit must fail in the absence of Masudan, and the second is that the plaintiff cannot sue on the mortgage of 1892 alone, while the usufructuary mortgage of 1885 is still unsatisfied.

It appears to me that the appellants must succeed on the first point. Masudan is certainly interested in the mortgage and the plaintiff is well aware of his interest. Therefore, under the plain terms of section 85 of the Transfer of Property Act and Order XXXIV, rule 1 of the Code, the plaintiff was bound to make him a party. It may be argued that practically he is a party, being represented by the *kurta* of the family to which he belongs. It has been held in *Hori Lal* v. *Munman Kunwar* (1) and *Madan Lal* v. *Kishan Singh*(2), that Order XXXIV, rule 1, is not fatal to a suit like this. But that view has not been taken in this Court. It was put, if I may say so, as

(1) (1912) I.L.R. 34 All. 549. (2) (1912) I.L.R. 34 All. 572.

exhaustively and as effectively as it could be put, by Ghose J. in *Lala Suraj Prosad* v. *Golab Chand* (1). But this court did not accept it [*Lala Suraj Prosad* v. *Golab Chand* (2)] and that decision must be taken as the law in this province. It has been argued that section 85 and Order XXXIV, rule 1, refer only to defendants. But this is an impossible contention. If the legislature had meant to say defendants, there is no conceivable reason why it should not have said so. But it enacted that all interested persons must be joined as parties. Indeed it would seem quite as important to join all the mortgagees as to join all the mortgagors in order to avoid multiplicity of suits. And in the present case where the plaintiff is a member of a joint Hindu family, who according to several decisions would be unable to sue alone for the recovery of land belonging to the family, it would seem especially necessary to make the other members of the family parties.

I think, therefore, that the suit offends against section 85 of the Transfer of Property Act and Order XXXIV, rule 1, and, as Masudan now cannot effectively be made a party, the suit must fail. I do not think it is a case of much hardship as the plaintiff put off the suit till the last moment and then apparently took no real proceedings for three years more.

In this view, it is unnecessary to come to any decision on the second point, but I may say that I cannot find anything in the law, as laid down in the statutes, to prevent a mortgagee, who holds an usufructuary mortgage and a subsequent simple mortgage, from suing on the latter alone, unless it be section 99 of the Transfer of Property Act, now Order XXXIV, Rule 14. But the learned vakil for the defendants tells us that that rule has no application to

(1900) I. L. R. 27 Calc. 724. (2) (1901) I. L.

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the case and that he does not rely on it. It is not however, necessary to say more on this point.

D. CHATTERJEE J. I agree.

O. M. *Appeal allowed.*

ORIGINAL CIVIL.

Before Imam and Chapman JJ.

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Jan. 2.

In the matter of AN ATTORNEY*.

Appeal to Privy Council—Review—Civil Procedure Code (Act V of 1908) O. XLVII—Letters Patent, 1865, cls. 10, 39—Sanction for prosecution—Criminal Procedure Code (Act V of 1898) s. 195.

An order sanctioning prosecution made in the course of a disciplinary proceeding against an attorney under cl. 10 of the Letters Patent of 1865, is not governed by cl. 39 and therefore against such an order no leave to appeal to the Privy Council can be given.

Cl. 39 of the Letters Patent empowers the High Court to declare the fitness of an appeal to the Privy Council in any matter, not being of criminal jurisdiction, if it is a final judgment, decree, or order of the Court, made on appeal or in the exercise of original jurisdiction.

A proceeding under cl. 10 is a disciplinary power which does not fall under any of the jurisdictions specified in the Letters Patent, and thus is not governed by cl. 39.

On the 29th of August 1913, an order was made by the Chief Justice and Stephen and Chaudhuri JJ. granting to the Public Prosecutor of Calcutta sanction under section 195 of the Code of Criminal Procedure to prosecute one Paresh Chandra Ghosh, an attorney of this Court, for offences punishable under sections 193 and 196 of the Indian Penal Code alleged to have been committed by him in relation to a proceeding in

* Application for Review (Original Civil Appellate Jurisdiction).